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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 329

ZOLA BURDON, ADMINISTRATRIX OF THE ESTATE OF ROBERT
BURDON, DECEASED,

Petitioner,

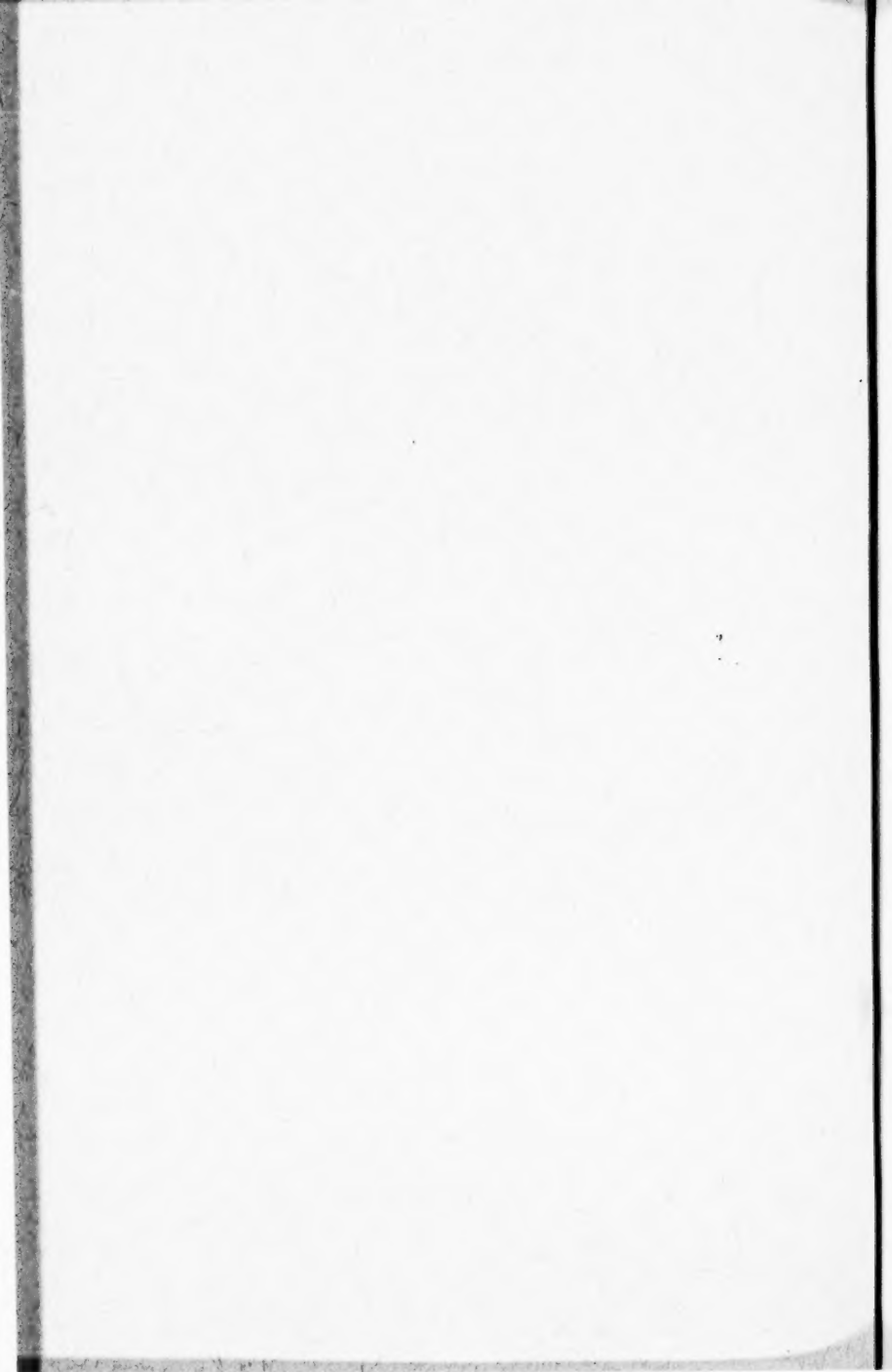
vs.

CLARENCE WOOD.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.

CHARLES M. LaFOLLETTE,
HERMAN L. MCCRAY,
JOHN H. JENNINGS,
CURTIS C. PLOPPER,
J. WM. DAVIDSON,

Counsel for Petitioner.



INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary and short statement of the matter involved	1
Statement of the basis upon which it is contended that this court has jurisdiction.	7
Questions presented	9
Reasons relied upon for the allowance of the writ	16
Prayer for writ	17
Brief in support of petition	19
Opinion	19
Jurisdiction (see petition)	20
Statement of the case	20
Specification of errors	24
Argument	24, 28, 38, 39
Summary of argument	24
Proposition I	25, 35
II	26, 37

TABLE OF CASES CITED.

<i>Booth v. Gilbert</i> , 79 F. (2d) 790	32
<i>Brig Struggle v. United States</i> , 9 Cranch 71, 3 L. Ed. 660	16, 35
<i>Chicago, etc., Co. v. Vandenburg</i> , 164 Ind. 470, 73 N. E. 990	25
<i>Chicago, M. St. P. & P. R. Co. v. Linchan</i> , 66 F. (2d) 373	32
<i>Cleveland, etc., R. Co. v. Hadley</i> , 170 Ind. 204	10, 26
<i>Cleveland, etc., R. Co. v. Starks</i> , 58 Ind. App. 341, 106 N. E. 653	11, 28
<i>Cleveland, etc., R. Co. v. Wolf</i> , 189 Ind. 585, 128 N. E. 38, 128 N. E. 695	25
<i>Emanuel v. Kansas City Title & Trust Co.</i> , 127 F. (2d) 175	13, 34
<i>Fox v. Barekman</i> , 178 Ind. 572, 99 N. E. 989	31

	Page
<i>Great Lakes Dredge, etc. Co. v. Totzke</i> , 69 Ind. App. 303	30
<i>Liggett & Myers Tobacco Co. v. DePareq</i> , 66 F. (2d) 678	32
<i>Lynch v. Bates</i> , 139 Ind. 206, 38 N. E. 806	31
<i>McKee v. Mutual Life Ins. of New York</i> , 51 N. E. (2d) 474	12
<i>National Labor Relations Board v. Hudson Motor Car Co.</i> , 128 F. (2d) 528	13, 33
<i>Norris v. Casel</i> , 90 Ind. 143	11, 26
<i>Pennsylvania R. Co. v. Chamberlain</i> , 288 U. S. 333, 53 Sup. Ct. 391, 77 L. Ed. 819	13
<i>Pittsburgh, etc., R. Co. v. Williams</i> , 74 Ind. 462	27
<i>Rutherford v. Foster</i> , 125 Fed. 187	12, 32
<i>Sampson v. Channel</i> , 110 F. (2d) 754, 128 A. L. R. 394	25
<i>Schlosser v. Griffith</i> , 125 Ind. 431, 25 N. E. 459	11, 26
<i>Scoopmire v. Tasflinger</i> , 52 N. E. (2d) 728	11, 28
<i>Smith v. Wabash</i> , 141 Ind. 92	25
<i>Southern R. R. Co. v. Crone</i> , 51 Ind. App. 300, 99 N. E. 762	26
<i>Springman v. Gary State Bank</i> , 124 F. (2d) 678	34
<i>Wm. P. Jungclaus Co. v. Ratti</i> , 67 Ind. App. 84, 118 N. E. 966	12, 28
<i>Woodsmall v. Myers</i> , 87 Ind. App. 69	28
<i>Worcester v. Pure Torpedo Co.</i> , 140 F. (2d) 358	25

STATUTES CITED.

Jud. Code, Sec. 240(a), 28 U. S. C. A. 347(a)	9
28 U. S. C. A. 41(1), Jud. Code, Sec. 24	9
28 U. S. C. A. 41(1) (b), Jud. Code, Sec. 24	9
28 U. S. C. A. 350	9

TEXT CITED.

Thompson's Commentaries on the Law of Negligence (2d Ed.) Sec. 2773	27
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 329

ZOLA BURDON, ADMINISTRATRIX OF THE ESTATE OF ROBERT
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Petitioner,

vs.

CLARENCE WOOD.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

*To the Honorable Harlan F. Stone, Chief Justice, and the
Associate Justices of the Supreme Court of the United
States:*

Your petitioner respectfully shows:

PART I.

Summary and Short Statement of the Matter Involved.

The petitioner, as administratrix of the estate of her deceased husband, Robert Burdon, brought suit against the respondent, Clarence Wood, alleging that on September 23,

1942, the respondent had wrongfully shot and killed her decedent. The respondent-defendant, by his answer, admitted the killing, but pleaded that the killing was done in self-defense.

The defendant took no exceptions to any of the evidence or instructions and no question is raised on any of the pleadings. The sole question presented is whether or not Judge Robert Baltzell, the District Judge of the District Court of the United States for the Southern District of Indiana, erroneously permitted the jury to pass upon the facts.

Inasmuch as all of the evidence must be considered, in this case, it becomes necessary for the petitioner-plaintiff to set out a short resume of the material evidence in order that this Court may have a fair opportunity to consider the case.

It was stipulated that the defendant shot and killed Robert Burdon on the morning of September 23, 1942. (R. 8.)

There were no witnesses to the shooting except employees of the defendant, who had been in his employ many years, one of whom was a cousin of the defendant, (R. 14.)

The material evidence produced by the witnesses, both for the petitioner-plaintiff and for the respondent-defendant was as follows:

- 1.

The petitioner's decedent, Robert Burdon, was an employee of Clarence Wood, the respondent, who was president and manager of The Dells, Inc., a night club situated near the north shore of the Ohio River, on the Indiana side of the river, but within the territorial limits of the Commonwealth of Kentucky. Robert Burdon had been employed as a bartender by the respondent-defendant at this club. The decedent had gone to work on the 22nd day of September, 1942, and had worked at the bar up until closing time, at 2:00 A. M., September 23, 1942. He had re-

mained in the bar during the early hours of the morning of September 23, 1942, so that he could obtain a ride to his home in Henderson, Kentucky, with another employee, who was planning to leave the establishment later in the morning of September 23rd, this being Robert Burdon's usual way of going home.

2.

At about 7:30 o'clock on the morning of September 23, 1942, the respondent-defendant, getting up for the purpose of going to the toilet, carried a 380 Colt automatic from his trailer in which he had slept near the night club. The respondent-defendant admittedly had had an undetermined number of drinks the night before and had retired in the early hours of September 23rd.

3.

The respondent-defendant allegedly heard an argument going on in the barroom, entered the barroom and demanded that Robert Burdon and Delbert Winchell, another employee, stop the argument. Testimony of the respondent-defendant and his employees indicated that Robert Burdon had replied that he would do as he pleased, that he drew a revolver from his pocket, and fired a shot at the respondent-defendant, whereupon Clarence Wood shot Robert Burdon in the face, mortally wounding him. There had been no argument between Clarence Wood and Robert Burdon. Few words had passed between them prior to the shooting. No disturbance occurred until Clarence Wood entered the room.

4.

The respondent-defendant and his employees all testified that the wounded man, Robert Burdon, fell behind the bar in the barroom of The Dells, and that none of them touched him or his revolver at any time following the shooting. They testified that the sheriff who was a former em-

ployee of the respondent-defendant was called to the scene by Clarence Wood after the shooting. The sheriff admittedly made practically no investigation of the shooting; took the respondent-defendant into his protective custody, rather than to the jail, and housed the respondent-defendant in his residence for a period of some ten days.

5.

The respondent-defendant and his employees all testified that medical assistance did not reach the side of the wounded man until approximately an hour after the shooting, and that none of them had done anything for the wounded man in his helpless condition, even though he was moaning and bleeding profusely from the wound made by Clarence Wood's bullet, and was obviously in need of medical attention.

6.

The respondent-defendant and his employees all testified that the participants in the shooting were at least sixteen feet apart at the moment of the shooting, that a bullet from Robert Burdon's gun which was, they said, fired only once, entered the door jamb immediately above Clarence Wood's head.

7.

Merle Wood, cousin of the respondent-defendant, testified that he later removed the bullet which had entered the door jamb above the respondent-defendant's head, and had thrown it away, without showing it to any legal authority, thus preventing one of the most material bits of evidence that could have been presented at the trial of the cause from being shown to the trial court and jury.

8.

The petitioner-plaintiff produced relevant and material evidence that the decedent, Robert Burdon, always carried

his revolver with one unloaded or empty shell in its revolving cylinder. This evidence was produced by two witnesses, called by the petitioner, who had known the decedent for many years. There was relevant and material evidence produced by disinterested witnesses called by the petitioner, to the effect that the deceased, Robert Burdon, was a person of good moral character and one slow to anger. All who had seen the deceased, both immediately after the shooting and before his body was prepared for burial, indicated that his face was seared by powder burns. A ballistics expert called on behalf of the petitioner-plaintiff testified that powder burns could not be made by a 380 Colt automatic at a distance greater than one foot, thereby contradicting the testimony of the respondent-defendant and his employees that the participants in the shooting were at least sixteen feet apart.

9.

There was relevant and material evidence produced by the petitioner's witnesses to the effect that the bullet hole made in the door jamb immediately above Clarence Wood's head, at the moment of the shooting, was a clean, round hole which could only have been made by a jacketed bullet. Further evidence produced by petitioner's witnesses showed that the bullets used in Robert Burdon's gun were lead in character and would have spread or flattened against any hard surface, thereby producing an irregular hole.

10.

The testimony of the sheriff of Henderson County, Kentucky, indicated that there were only five loaded bullets in the revolving cylinder of the deceased's revolver at the moment when it was picked up from the floor back of the bar at a point near the outstretched hand of the mortally wounded Robert Burdon. One shell in the revolving cylin-

der of the decedent's gun was empty when it was examined by the sheriff.

11.

No attempt was made by the sheriff of Henderson County to find the shells which had been ejected from the 380 Colt automatic with which the respondent-defendant had shot and mortally wounded Robert Burdon. He testified that the employees had swept up the shells and had thrown them away.

The evidence produced by the respondent-defendant in the trial court below tended to show that the killing was done as an act of self-defense on the part of Clarence Wood. Testimony of the plaintiff's witnesses tended to show, reasonably, that the deceased, Robert Burdon, had not so much as fired his revolver, and that the killing was unjustified.

At the close of the presentation of the plaintiff's evidence, the defendant moved the court for a dismissal of the action on the ground that upon the facts and the law, the plaintiff had shown no right to relief. This motion was denied (R. 115). At the close of all the evidence, the defendant made motion for an order directing the jury to return a verdict for the defendant. This motion was taken under advisement by the court (R. 115 to 116).

After these two motions had been presented to the court, the case went to the jury which returned its verdict for the plaintiff and assessed her damages at Thirty-five Thousand Dollars (\$35,000.00) (R. 116). The court then rendered judgment upon the verdict of the jury (R. 116).

The respondent-defendant filed its motion for an order setting the verdict and the judgment aside and for entry of judgment in accordance with motion for directed verdict, and in the alternative for a new trial (R. 117, 118).

The Honorable Robert C. Baltzell, Judge of the District Court, then overruled the defendant's motion for an order setting aside the verdict and judgment, and for entry of

judgment in accordance with motion for directed verdict and in the alternative for a new trial (R. 118).

Appeal was then made by the respondent-defendant to the Circuit Court of Appeals (R. 118 to 121).

The Circuit Court of Appeals for the Seventh Circuit reversed the above judgment on appeal, to reverse which action this petition is filed.

PART II.

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review This Judgment.

A.

The amended complaint of Zola Burdon, Administratrix of the estate of Robert Burdon, deceased, petitioner herein, was filed in the District Court of the United States for the Southern District of Indiana. The petitioner-plaintiff was then, and now is, a resident of the Commonwealth of Kentucky. The respondent-defendant was, at the time of the filing of the complaint, and now is, a resident of the State of Indiana. The amended complaint of the petitioner-plaintiff prayed for recovery in the sum of Fifty Thousand Dollars (\$50,000.00) (R. 2 to 4.)

Said District Court rendered judgment in favor of the petitioner-plaintiff and against the respondent-defendant on the 14th day of October, 1943, in the amount of Thirty-five Thousand Dollars (\$35,000.00), together with her costs (R. 116 to 117).

Neither of the parties in this action at any time questioned the jurisdiction of either the parties or the subject matter.

B.

(1)

The United States Circuit Court of Appeals for the Seventh Circuit, on May 11, 1944, rendered its opinion (R.

129 to 134), in Cause No. 8486, reported in 142 F. (2d) 303, and entered judgment reversing the judgment of the District Court with directions to proceed in accordance with the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 134).

(2)

On the 24th day of May, 1944, this petitioner-plaintiff filed in the office of the Circuit Court of Appeals for the Seventh Circuit, in Cause No. 8486, its petition for rehearing and brief in support thereof (R. 135). This petition was filed within the fifteen days permitted by the rules of said court, Rule 22, page 12, of the Rules of the United States Circuit Court of Appeals, for the Seventh Circuit, effective May 31, 1941.

(3)

On the 3rd day of June, 1944, there was filed in the office of the Clerk of the Circuit Court of Appeals for the Seventh Circuit, an Answer to Petition for Rehearing (R. 135).

(4)

On the 5th day of June, 1944, the Circuit Court of Appeals for the Seventh Circuit, in said Cause No. 8486, made and entered its order (R. 135), which reads as follows:

“It is ordered by the Court that the Petition for a Rehearing of this cause be, and it is hereby, denied.”

C.

This petitioner duly filed in this Court, this, her printed Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, together with her Brief in Support Thereof, and one printed certified copy of the Transcript below, together with the req-

quisite number of printed copies of the Transcript, this Petition and the Brief in Support Thereof, as required by the rules of this Court, on the 7th day of August, 1944.

D.

WHEREFORE, the petitioner says that this Court has jurisdiction to entertain this, her Petition for Writ of Certiorari and to review the Judgment of the United States Circuit Court of Appeals for the Seventh Circuit, review of which is sought hereby.

(1) The jurisdictional amount is present. (Title 28, Ch. 2, Sec. 41 (1) U. S. C. A.; Jud. Code, Sec. 24, as amended.)

(2) The requisite diversity of citizenship is present. (Title 28, Ch. 2, Sec. 41, (1) (b), U. S. C. A.; Jud. Code, Sec. 24, as amended.)

(3) The petition for this Writ of Certiorari is filed seasonably and within the time. (Title 28, Ch. 9, Sec. 350, U. S. C. A.)

(4) This petition having been seasonably filed, the discretionary right or power of this Court for determination and review is invoked. (Jud. Code, Sec. 240 (a), amended, U. S. C. A., Title 28, Sec. 347 (a)).

PART III.

Questions Presented.

PRELIMINARY STATEMENT.

There is only one question presented, in this appeal, arising out of the decision of the Circuit Court of Appeals for the Seventh Circuit in which the judgment of the trial court and jury below is reversed. Your petitioner believes that the decision of the Circuit Court of Appeals has deprived her of her right to a jury trial of the facts pre-

sented in the court below. The decision of the Circuit Court of Appeals is not in accord with: (1) The prevailing law of the State of Indiana, which was the law of the forum and which controlled as to all questions of presumption, testimony, and evidence, and the jury's right to pass upon those questions; (2) the decided law of other circuit courts as it pertains to the questions of presumption, testimony and evidence; and (3), the prevailing law found in the decisions of the United States Supreme Court as they pertain to the questions of presumption, testimony and evidence and the jury's right to pass upon them.

Your petitioner will discuss each of the above outlined questions presented as error on the part of the Circuit Court of Appeals for the Seventh Circuit under the Subsections which follow:

A.

Under the law of the State of Indiana, the willful killing of one person by another raises a presumption of wrongfulness. In the case at hand, the petitioner in her amended complaint charged that the respondent-defendant unlawfully shot and killed Robert Burdon, the petitioner's decedent (R. 2).

The respondent-defendant, by his answer to amended complaint, admitted the killing, but pleaded justification on the grounds of self-defense (R. 6).

Under the law of the State of Indiana, which was the law of the forum, these pleadings immediately raised a presumption in favor of the petitioner-plaintiff, and the burden of proof then passed to the respondent-defendant to prove justification for the killing of petitioner-plaintiff's decedent. See *Cleveland, etc. R. Co. v. Hadley*, 170 Ind. 204.

Justice Minton, in his opinion for the Circuit Court of

Appeals for the Seventh Circuit, reversing the decision of the trial court, stated that the petitioner-plaintiff had made a prima facie case:

“Upon a showing that the defendant had shot and killed the decedent, a prima facie case of wrongful death was made out, and it then became the duty of the defendant to justify the killing” (R. 131).

Schlosser v. Griffith, 125 Ind. 431, 25 N. E. 459;
Norris v. Casel, 90 Ind. 143.

Your petitioner believes that the Circuit Court of Appeals for the Seventh Circuit, in rendering its judgment reversing the decision of the District Court of the United States for the Southern District of Indiana, disregarded: (1) The prima facie case made by the petitioner-plaintiff which raised a presumption in favor of the petitioner-plaintiff's position and which passed the burden of proof to the respondent-defendant; and (2) the material and substantial evidence presented by the petitioner-plaintiff in the court below, which through the material facts proved, as well as the testimony of unbiased witnesses produced by the petitioner-plaintiff, caused the reasonable minds of the jury to disbelieve the testimony produced by the respondent-defendant and his employees.

It is the petitioner-plaintiff's contention that where a prima facie case is made and where there is relevant and material substantiating evidence supporting the plaintiff's position, all the evidence must go to the jury for its determination, since the jury is the sole judge of the weight of the evidence and the credibility of the witnesses.

Cleveland, etc. R. Co. v. Starks, 58 Ind. App. 341, 106 N. E. 653 (Transfer denied March 26, 1915);

Scoopmire v. Taflinger, 52 N. E. (2d) 728, 732, decided Feb. 1, 1944, — Ind. App. —;

Wm. P. Jungclaus Co. v. Ratti, 67 Ind. App. 84, 118 N. E. 966;

MaKee v. Mutual Life Ins. of New York, — Ind. —, 51 N. E. (2d) 474.

The ruling decisions in the State of Indiana could certainly not be held other than at variance with the opinion of the Circuit Court of Appeals, as those decisions pertain to the precise situation found in the case at hand.

B.

The decision of the Circuit Court of Appeals for the Seventh Circuit was clearly at variance with the decided opinions of the other circuit courts as they pertain to the question of: (1) The presumption of wrongfulness in the killing of one person by another when a prima facie case is made by the plaintiff; and (2) the sufficiency of evidence presented by the plaintiff in support of the prima facie case and presumption of wrongfulness.

The case of *Rutherford, et al. v. Foster, et al.* (C. C. A. 8th Cir., 1903), cited in 125 F. 187, is clearly in point, as to the question of the legal presumption raised by the killing of one man by another. This case forcefully states that the legal presumption is that such killing is wrongful and that the burden of proof then shifts to the defendant to plead and prove matter in justification or mitigation of the act of killing (P. 193). This case will be more fully discussed in the brief which follows.

As was stated in Point A under Questions Presented, Justice Minton clearly stated that a prima facie case had been made by the petitioner-plaintiff and that it then became the duty of the respondent-defendant to show justification for the killing. In other words, the burden of proof shifted to the defendant.

The rule appears to be practically universal among all federal jurisdictions that where some substantial evidence supports the plaintiff's prima facie case and the presumptions raised, even though testimony is produced by the adverse party, it still is a jury question to determine which party shall prevail.

National Labor Relations Board v. Hudson Motor Car Co., 128 F. (2d) 528;

Emanuel v. Kansas City Title & Trust Co., et al., 127 F. (2d) 175.

It is the earnest contention of the petitioner that the Circuit Court of Appeals for the Seventh Circuit rendered an opinion clearly at variance with the prevailing law established in other federal circuit courts as it deals with the above outlined case.

C.

It is further contended that the Circuit Court of Appeals for the Seventh Circuit was in error in its decision by reason of the fact that it was at variance with the decided law of the Supreme Court of the United States. Both, the respondent herein, in his appeal brief to the Circuit Court of Appeals, and Justice Minton, in the opinion of the Circuit Court of Appeals, cited the case of *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, in support of the respondent-defendant's position.

The Circuit Court of Appeals citing this case, stated:

"Where the material evidence from the lips of unimpeached witnesses is non-conflicting and could lead honest, disinterested and reasonable men to but one conclusion, there are no factual matters to be resolved which call for the intervention of a jury. Such facts await only a court to announce their effect in law" (R. 132).

It is the earnest contention of the petitioner that the exact opposite of the above stated opinion would obtain, where (1) a prima facie case has been made, raising the presumption of wrongfulness, and passing the burden of proof to the respondent-defendant, and (2) where there is material rebutting evidence afforded by the plaintiff to refute the testimony of the unimpeached witnesses. In the case at hand a prima facie case was made, raising its presumption, and such relevant and material evidence was indeed afforded at the trial of this cause by the petitioner-plaintiff, all of which means that only the jury could pass upon the counter-opposed facts of evidence submitted at the trial.

The jury was also the sole judge of the credibility of the witnesses and had the right to conclude as "honest, disinterested and reasonable men", that the killing did not take place as the witnesses claimed it did, not only because of lack of credibility, but also because of conflict in a material fact. The jury had a right to believe the testimony of petitioner-plaintiff's ballistic expert, that a 380 Colt Automatic would not leave powder marks at sixteen feet away.

The fact that the petitioner-plaintiff's decedent, Burdon, and the defendant-respondent, Wood, were standing in the roadhouse at the time Burdon was killed, in certain positions, which positions were 16 feet apart, was a material fact, in the whole story of the manner in which the shooting took place, testified to by Wood, and everyone of his hireling witnesses.

Therefore the distance between the parties was a material fact revealing the positions of the parties in the roadhouse at the time of the killing, from which fact the jury could accept or reject the truthfulness of the testimony of the

defendant-respondent, Wood, and his witnesses. Even the defendant-respondent, Wood's own ballistic witness testified that ten feet was the farthest possible distance from which a 380 Colt automatic could be fired and leave powder marks.

Therefore there was not only a conflict in the evidence upon a material fact in the testimony of the defendant-respondent, Wood, and that of his witnesses, which entitled the jury, as a matter of law, to disregard all of his testimony and that of his hireling witnesses. But it is also true that if the jury believed the ballistic experts, as they, not the Circuit Court of Appeals, had a right to do, then the jury had no credible evidence before it as to the manner in which the shooting took place; so that as a matter, both of fact and of law, the jury could not know how the shooting took place, they only knew that the defendant-respondent, Wood, admitted that he shot and killed Burdon.

If they believed the ballistic experts of both parties, as they had a right to do, then they could not, as a matter of law, do anything else but find for the plaintiff-petitioner upon the admission of the defendant-respondent, Wood, that he killed Burdon with a revolver, a deadly weapon.

Therefore the opinion and decision of the Circuit Court of Appeals for the Seventh Circuit clearly invades the province of the jury, and since it does this, it is therefore contrary, not only to the law of Indiana, the controlling law under the rule laid down in *Eric Railroad v. Tompkins*, but also it is contrary to all the previous decisions of this Court.

Your petitioner contends that a prima facie case supported by substantial evidence cannot disintegrate, and the jury, as the trier of the facts, must pass upon the effect of the presumption raised by the prima facie case as well as

the weight of the evidence supporting it. Therefore, in raising the question of the variance of the opinion of the Circuit Court of Appeals from the decided law of this Court, we call attention to the fact that the Circuit Court undoubtedly committed error.

Brig Struggle, Thomas Leigh, Claimant v. The United States, 13 U. S. 71, 9 Cranch 71, 3 L. Ed. 660.

PART IV.

Reasons Relied On for the Allowance of the Writ.

PRELIMINARY STATEMENT.

The reasons relied on for granting the writ are closely connected with the Questions presented. Your petitioner will, as you will note, enlarge on the questions presented and the reasons relied on for the allowance of the writ in the brief which follows this petition. All reasons relied on pertain to the fact that your petitioner earnestly believes that the effect of the opinion of the Circuit Court of Appeals deprives her of her right to a jury trial of her cause. Unquestionably, in the case at hand, the opinion of the Circuit Court of Appeals is erroneous by reason of the questions presented in Part III.

A.

The opinion of the Circuit Court of Appeals is contrary to the local law of Indiana, which was the law of the forum at the trial of this case. (See authorities cited under III A, p. 10, this Petition.)

B.

The second question and error presented by the opinion of the Circuit Court of Appeals is due to the fact that that

opinion is contrary to the decisions of other federal courts. (See authorities cited under III B, p. 12, this Petition.)

C.

The third question and error presented by the opinion of the Circuit Court of Appeals is due to the variance between that opinion and the decided law of this Court. (See authorities cited under III C, p. 13, this Petition.)

D.

Your petitioner believes that the opinion of the Circuit Court of Appeals is violative of the law of evidence which has reached great conformity, on the question herein presented, among both the state and federal courts. This petitioner must not be deprived of her right to a jury trial of her cause by reason of such conflicting opinion.

WHEREFORE your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, requiring said court to certify and send to this Court a full and complete Transcript of Record and of the proceedings of said United States Circuit Court of Appeals for the Seventh Circuit, had in the case numbered and entitled on its docket, 8486, *Zola Burdon*, Administratrix of the Estate of Robert Burdon, deceased, Plaintiff-Appellee vs. *Clarence Wood*, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court to the extent prayed in this petition and as provided for by the statutes of the United States; and that the judgment

herein of the said United States Circuit Court of Appeals for the Seventh Circuit be reversed by the Court, and for such further relief as this Court may deem proper.

This 7th day of August, 1944.

Respectfully submitted,

ZOLA BURDON,

Administratrix of the Estate

of Robert Burdon, Deceased,

Petitioner,

By CHARLES M. LaFOLLETTE,

of Evansville, Indiana;

HERMAN L. MCCRAY,

of Evansville, Indiana;

JOHN H. JENNINGS,

of Evansville, Indiana;

CURTIS C. PLOPPER,

of Evansville, Indiana;

J. WM. DAVIDSON,

of Evansville, Indiana;

Counsel for Petitioner.

